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RECOGNIZING SAME-SEX MARRIAGE: ASKING FOR THE IMPOSSIBLE?

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Advocates for recognition of same-sex marriage are celebrating again. In February 1998, an Alaskan trial court in *Brause v. Bureau of Vital Statistics*[1] declared that the government must show a compelling state interest justifying the statutory definition of marriage as "a civil contract entered into by one man and one woman . . . ."[2] In declaring the Alaska statute constitutionally suspect, the court relied upon state constitutional privacy protection, which extends to situational[3] and decisional privacy.[4] The court opined that the choice of a life partner is within the realm of decisional privacy, stating that "[g]overnment intrusion into the choice of a life partner encroaches on the intimate personal decisions of the individual. This the Constitution does not allow unless the state can show a compelling interest 'necessitating the abridgment of the . . . constitutionally protected right.'"[5]

While similar in outcome, the Alaskan court diverged sharply from the jurisprudential trail blazed almost five years ago by two justices of the Hawaii Supreme Court's plurality opinion in *Baehr v. Lewin*.[6] In *Baehr*, Justices Moon and Levinson declared that the state constitutional protection against sex-based discrimination required the State of Hawaii to

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* Professor of Law, South Texas College of Law, affiliated with Texas A&M University. I am grateful for the assistance and friendly criticism I received from David Coolidge, Catherine Burnett, Russell Hittenger, Lynn Wardle, Tobin Sparling, Sally Langston, Elisa Ugarte. While none of them agrees entirely with this article, and some disagree with most of the ideas presented, each of them improved it considerably. A substantial portion of Part II of this article originally appeared in Teresa Stanton Collett, *Marriage, Family and the Positive Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467 (1996).

1. No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. 1998).

2. *Id.* at *1.

3. Situational privacy extends to conduct occurring in traditionally private settings, like the home or the marital bedroom. The *Brause* court referred to *Ravin v. State*, 537 P.2d 494 (Alaska 1974), in which the Alaska Supreme Court declared unconstitutional a statute prohibiting adult possession of marijuana for personal home use. *See Brause* at *3 (recognizing fundamental privacy rights).

4. *See Brause* 1998 WL 88743 at *3 (relying upon Griswold v. Connecticut, 381 U.S. 479 (1965)). The *Brause* court suggested that government intrusion into intimate decisional privacy rights was improper. *See id.*

5. *Id.* at *5 (quoting Breese v. Smith, 501 P.2d 159, 170 (Alaska 1972)).

6. 852 P.2d 44 (Haw. 1993).

confer the legal status of marriage on same-sex partners, absent a compelling state interest in reserving that status for couples comprised of one man and one woman.[7] Unlike Judge Michalski in *Brause*, however, the entire *Baehr* court agreed that the state constitutional right to privacy provided no fundamental right to same-sex marriage. To establish such a right, the plaintiffs in *Baehr* would have had to show that their claim was either "so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions[,]"[8] or that it was "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed."[9] Neither standard was satisfied by the *Baehr* plaintiffs.

Upon remand, the trial court ruled that the State was equally unsuccessful in establishing that marriage inherently requires a man and a woman. This left little legal justification for the statutory limitation of marriage to unions of one man and one woman. On December 3, 1996, the Hawaiian trial court held that the sex-based statutory classification defining marriage violated the Hawaii Constitution's equal protection clause.[10]

Implementation of the order was stayed at the State's request, pending review by the Hawaii Supreme Court.[11] The Hawaii Supreme Court has yet to pass on this ruling by the trial court. This delay may be the result of judicial prudence in the face of an upcoming state-wide vote on a constitutional amendment providing: "[t]he legislature shall have the power to reserve marriage to opposite-sex couples."[12] Nonetheless, the fact remains that the most recent judicial pronouncements on the question of same-sex marriage in Hawaii and Alaska are both resoundingly affirmative.

How can this be? While most Americans living within the continental United States tend to think of Alaska and Hawaii as exotic vacation

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7. *See id.* at 67.

8. *Id.* at 57.

9. *Id.*

10. *See* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. 1996); *see also* HAW. CONST. art. I, § 5 (Hawaii's equal protection clause).

11. *See* Baehr v. Miike, 950 P.2d 1234 (Haw. 1997) (judgment decision); *see also* David Orgon Coolidge, *Playing the* Loving *Card: Same-Sex Marriage and the Politics of Analogy,* 12 BYU J. PUB. L. 201, 210 n.37 (1998).

12. H.B. 117, 19th Leg. (Haw. 1997). For the political history of this amendment and careful analysis of its constitutionality, see David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning, and Constitutionality,* 20 HAW. L. REV. (forthcoming 1998).

spots rather than sister states, their system of laws and democratic governance are similar to those of the other forty-eight states. Yet courts in both states have now reached a result consistently rejected by state legislatures throughout the country.[13] In fact, the Alaska statute at issue in *Brause* was enacted to avoid the result reached in Hawaii in *Baehr v. Lewin*.[14]

The Hawaiian and Alaskan decisions are grounded in two fundamental errors. First, these courts have engaged in what has been called "the judicial usurpation of politics."[15] This occurs when courts constitutionalize issues most properly addressed by the legislature. Invoking vague constitutional provisions like "privacy," the *Brause* and *Baehr* courts struck down statutes that failed to conform with the political judgment of the judges, thus substituting their will for that of the people or their representatives.

The second error of the *Baehr* and *Brause* courts is committed by many government officials. They err in the belief that marriage is created, rather than recognized, by the state. Marriage is a reality created by the commitment and actions of the couple. State involvement with marriage arises not because it is the source of the marital relationship, but because it encounters the reality of that relationship in the lives of its citizens. Government accommodates and supports marriage because of its beneficial effects on society.

The purpose of this article is to address the second error—the idea that marriage is created by the state, and thus can be modified by judicial or legislative fiat without concern for how those modifications comport with reality. Part I describes the ideal of marriage, and the benefits to society that flow from recognition and support of this ideal. While five primary characteristics of marriage are discernible, I argue that only two benefit society directly. These elements are the procreativity of marriage and the mutual support of spouses. Government has a powerful interest in encouraging conformity with the ideal of marriage to the degree that

13. Between 1993 and 1997, bills recognizing same-sex marriage were introduced and rejected in seven states. *See Partners Task Force for Gay & Lesbian Couples, Legislative Reactions to Hawaii Same-Sex Marriage* (visited March 14, 1998) <http://www.buddybuddy.com> [hereinafter *Partners Task Force*]. For a description of the political maneuvers on this issue, see Coolidge, *supra* note 11; *see also* Catholic Hawaii, *In Defense of Marriage: The Same-Sex Marriage Controversy in Hawaii and the Nation* (visited September 3, 1998) <http://www.pono.net/policy/samesex-marriage/ssm-sub.html>.

14. *See Partners Task Force*, *supra* note 13.

15. *See generally* Symposium, *The End of Democracy?: The Judicial Usurpation of Politics*, 67 FIRST THINGS 18 (1996).

conformity encourages the development of these characteristics.

I suggest that these social benefits can be accrued most effectively by identifying their source within the marital relationship. Procreation primarily occurs through heterosexual intercourse.[16] Once brought into being, children are best cared for by partners in permanent, committed relationships.[17] Therefore, the state has a strong interest in crafting its laws to channel procreative activity into such relationships. Society has traditionally called such relationships marriage, and I argue that we should return to this understanding of the state's role in encouraging and sustaining the procreative and permanent aspects of the marital relationship.

The second socially beneficial characteristic of marriage, mutual support, has no necessary connection with sexual activity, nor is it found exclusively in marriage. Rather, mutual support is the product of consent and commitment. These characteristics can be found in many relationships; some including sexual activity, others not. The elderly brother and sister who have never married, and have cared for each other's needs for a lifetime, is an example of a non-sexual relationship that is mutually supportive. Gay and lesbian couples committed to sharing their lives may also be examples of mutually supportive relationships having sexual components.

The presence or absence of a sexual component, however, is not determinative of the couple's capacity to provide mutual support. Recognizing the value of mutually supportive relationships to society, and their existence independent of sexual activity, the Hawaiian Legislature created a new legal status called "reciprocal beneficiaries."[18] In Part II of this article, I argue that the state may properly seek to promote the mutually supportive aspect of these relationships.

In Part III, I conclude that state recognition of marriage should remain reserved to opposite-sex relationships involving partners who are committed to the ideal of marriage, characterized by permanence, exclusivity, mutual support, and openness to the creation of new life. All other relationships, whether same-sex or opposite-sex, involving exclusive mutual support for an extended duration, may be recognized by the state

16. While technology now allows human life to be created in ways other than sexual intercourse, even those alternative methods of conception require a sperm and an egg. The vast majority of babies, however, are still "made" the old-fashioned way.

17. For an extended discussion of homosexual parenting, see generally Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833.

18. 31 HAW. REV. STAT. ANN. § 572C (Michie Supp. 1997).

through some system of registration similar to the reciprocal beneficiaries system adopted in Hawaii, but should not be equated with marriage.

I. THE IDEAL OF MARRIAGE

The ideal of marriage constitutes what I have called the "metaphysical reality" of marriage in prior articles.[19] This reality provides the basis for human relationships. Perhaps Pope John Paul II said it best when he described marriage as a communion of two giving rise to a community of persons greater than the two.[20] Marriage, as a communion of two, requires a total gift of self to the spouse. This gift includes sharing not only the mind, body, and spirit of a person, but their past, present and future as well. It encompasses not only the willing offering of self, but the loving reception and embrace of the other.[21]

Through the marital act of sexual intercourse, the man and the woman grant access to the most intimate regions of their bodies, and more importantly, they grant access to the most intimate regions of their spirits. The vulnerability created by mere physical nudity and contact is of little consequence when compared to the emotional and intellectual vulnerability experienced during lovemaking. Therefore, it is important to distinguish marital lovemaking from those acts of sexual intercourse that satisfy only physical appetites or economic needs. Neither casual sex nor acts of prostitution constitute the marital act of sexual intercourse. These acts seek only momentary gratification and are not ordered toward deepening the mutual commitment that is a necessary precondition to, and component of, marriage.

In contrast, the marital act of sexual intercourse experienced in its most potent form is a tumultuous and ecstatic union arising from the total sharing of mind, body, and soul. Nothing is held back from the spouse—no barriers are imposed to union. When making love, both the man and the woman surrender the illusion of control in exchange for the reality of communion.[22] By making love, the woman chooses to allow the

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19. *See* Teresa Stanton Collett, *Marriage, Family and the Positive Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 471 (1996).

20. *See* Pope John Paul II, *Familiaris Consortio* (On The Family) 18 (1981); Pope John Paul II, *Letter to Families*, *reprinted in* 23 ORIGINS 638, 641-42 (1994); *see also* 2 GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE 654 (1993).

21. *See* POPE JOHN PAUL II, ORIGINAL UNITY OF MAN AND WOMAN: CATECHESIS ON THE BOOK OF GENESIS 116-17, 131 (1981).

22. *See* KAROL WOJTYLA (POPE JOHN PAUL II), LOVE AND RESPONSIBILITY 99 (H.J. Willetts trans., 1981). The Pope stated that:

> If marriage is to satisfy the demands of the personalistic norm it must embody re-

man to enter her body. She embraces the possibility that they will be joined together beyond their lifetimes through the creation of a child. The man accepts this invitation, implicitly assenting to sharing not only this moment of pleasure, but the sharing of the future, through the arduous but rewarding task of raising children created by the union. Thus the object of marriage and its "signature act" of consummation, marital intercourse, is to transcend both the individual lovers and their limited existence in time. It is to permeate every aspect of the present relationship with the love of the couple, and extend it into the future by the creation of a new person as well.[23] This object can only be realized by complementary persons—male and female partners—within the marital relationship.

Through the marital union, heterosexual partners experience a completeness previously unknown to them as individuals. This completeness arises from the complementarity of the two persons. They are distinct persons, yet made for each other, as evidenced by the creative capacity of their union on all levels. The union of their minds is evidenced by the willing exchange of their thoughts and perceptions of their experiences.[24] The union of their souls is evidenced by their loving embrace of the mysterious other who is their spouse. The union of their bodies is evidenced by the procreative potential of marital intercourse.

II. THE CHARACTERISTICS OF MARRIAGE

The metaphysical reality of marriage, initiated in the original consent and commitment of the couple, is provided through the mutual support

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ciprocal self-giving, a mutual betrothed love. The acts of surrender reciprocate each other, that of the man and that of the woman, and though they are psychologically different in kind, ontologically they combine to produce a perfect whole, an act of mutual self-surrender.

Id.

23. Many commentators use this theory to explain high birth rates in war ravaged nations. *See, e.g.*, Tracy Wilkinson, *Bosnian Women Repudiate Death by Giving Birth*, L.A. TIMES, Aug. 21, 1995, at A1.

24. In WAR AND PEACE, Tolstoy offers this example:

As soon as Natasha and Pierre were alone they too began to talk as only husband and wife can talk - that is, exchanging ideas with extraordinary swiftness and perspicuity, by a method contrary to all the rules of logic, without the aid of premisses, deductions or conclusions, and in a quite peculiar way. Natasha was so used to talking to her husband in this fashion that a logical sequence of thought on Pierre's part was to her an infallible sign of something being wrong between them. When he began proving anything or calmly arguing, and she, led on by his example, began to do the same, she knew that they were on the verge of a quarrel.

2 LEO N. TOLSTOY, WAR AND PEACE 1394 (Rosemary Edmonds trans., 1978) (1869).

provided by the partners, and its permanence, exclusivity, and openness to the creation of new life.[25] It is these characteristics that have traditionally been the concern of positive law.

A. Permanent Duration

In her historical review of the institution of marriage in Western European nations, Professor Mary Ann Glendon found that marriage has always been defined as a relationship of extended duration, but subject to dissolution by mutual consent during many periods of history.[26] With the rise of Christianity's influence, marriage came to be viewed as a lifetime commitment, subject to dissolution only for grave reasons.[27] Once established, this ideal of marriage as a lifetime commitment held sway in Western European countries until the mid-1960's.[28] Laws then began to recognize or expand the application of no-fault and mutual consent divorce statutes.[29] This change in the positive law has led to multiple sequential marriages.[30]

The resulting "divorce revolution," however, is under attack.[31] Calls for recognition that permanent marriage should be the presumption of the positive law, absent compelling reasons for dissolution, come from divergent groups for a variety of reasons. Reviewing the undisputed evidence that men prosper and women and children suffer economically after divorce, some feminists now support a return to a requirement of

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25. *See* Collett, *supra* note 19, at 471 (detailing these characteristics).

26. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 17-34 (1989).

27. *See id.*

28. *See id.* at 149.

29. *See id.*; *cf.* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 296 (1997) ("At least thirty-eight out of fifty-three U.S. jurisdictions consider fault in awarding divorce, property division, or alimony.").

30. Some commentators refer to this as "serial polygamy." *See, e.g.*, Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 195 (1993); Daniel D. Polsby, *Ozzie and Harriet Had It Right*, 18 HARV. J.L. & PUB. POL'Y 531, 533 (1995).

31. *See generally* ROBERT N. BELLAH ET AL., THE GOOD SOCIETY 258-61 (1991); DIANE MEDVED, THE CASE AGAINST DIVORCE (1989) (describing numerous interviews with divorced individuals who recognize the costs exacted by the breakup of their marriages); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985) (discussing the negative social and economic effects of the divorce revolution on women and children). *But see* STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 255-81 (1992) (suggesting that significant family harm is caused by social and market indifference rather than marital dissolution).

cause for divorce.[32] The same evidence convinces some fiscal conservatives that protection of the public purse from claims for assistance compels a rethinking of no-fault divorce.[33] Advocates for a return to traditional morality argue that permanency in marriage is required to provide stability in rearing the next generation and mutual support throughout the lives of the spouses.[34] Religious arguments also support a return to permanency on the basis of the metaphysical reality of marriage.[35]

Responding to these critiques, many states have reestablished fault as a consideration in the division of property or have lengthened the waiting periods required before a divorce decree becomes final. The most innovative response has been the Louisiana Legislature's enactment of a two-prong licensure system.[36] Opposite-sex couples applying for marriage licenses are given the opportunity to elect to have their marriage treated as a covenant marriage. By this election, the couple commits to taking all reasonable steps to preserve their marriage if problems arise.[37] Absent serious fault by one of the parties, they agree to the extension of

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32. *Cf.* Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 827-30 (noting that many women are economically disadvantaged by the policy rationales underlying no-fault divorce). *But see* Martha Heller, Note, *Should Breaking-Up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have Upon Domestic Violence*, 4 VA. J. SOC. POL'Y & L. 263, 265-66 (1996) (opposing a return to fault-based divorce).

33. *Compare* Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 870 (1994) (arguing that "it is time to question whether unilateral no-fault divorce is worth its costs to the institution of marriage"), *and* Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 10-11 (1990) (noting criticism of no-fault divorce), *with* Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 119-24 (1993) (advocating a partnership model for divorce proceedings to ameliorate unjust economic disparities resulting from no-fault divorce schemes).

34. *Cf.* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 81 (noting the failure of no-fault divorce to balance the permanency of marriage with the need to cure the failure of fault grounds).

35. *See* Pope John Paul II, *Letter to Families*, *supra* note 20, at No. 7; *see also The Ramsey Colloquium, The Homosexual Movement: A Response by the Ramsey Colloquium*, FIRST THINGS *at 15-21* (visited Mar. 1994) *<http://www.Firstthings.com/FTissues /FT9403/homo.hmtl>*; *cf.* ASAF A. A. FYZEE, OUTLINES OF MUHAMMADAN LAW 124 (4th ed. 1974) ("[A contract regarding marriage] may also provide for the dissolution of the marriage by the wife, without the intervention of the court."); Blu Greenberg, *Women and Judiasm, in* CONTEMPRARY JEWISH THOUGHT: ORIGINAL ESSAYS ON CRITICAL CONCEPTS, MOVEMENTS, AND BELIEFS 1039, 1046 (Arthur A. Cohen & Paul Mendes Flohr eds., 1987) ("A Jewish marriage is terminated by either death or the giving of a *get*, the writ of divorce.").

36. *See* LA. CIV. CODE ANN. arts. 102-03 (West 1993 & Supp. 1998); LA. REV. STAT. ANN. §§ 9:224, :225, :234, :245 (West 1991 & Supp. 1998).

37. *See* LA. REV. STAT. ANN. § 9:273A (1) (West Supp. 1998).

required time periods prior to the entry of a final divorce decree in order to enhance the chances of reconciliation.[38] Through this system, the Louisiana Legislature provides at least partial protection of the expectations of those who enter marriage believing that it is permanent commitment.[39]

B. Mutually Supportive

Mutual support is another characteristic of marriage that has been recognized throughout history and in all cultures.[40] Often articulated in state statutes[41] and judicial opinions,[42] this duty encompasses both the sharing of emotional[43] and financial resources.[44] This sharing of resources is the basis for the positive law governing spousal privilege,[45] taxation, and property ownership. It is presumed in laws defining creditors' rights and governmental entitlements, and is a major consideration in crafting

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38. *See id.* § 307A(5), (6).

39. *See* Katherine Shaw Spaht, *Beyond* Baehr*: Strengthening the Definition of Marriage*, 12 BYU J. PUB. L. 277 (1998). For a general defense of issuing multiple types of marriage licenses, see Christopher Wolfe, *The Marriage of Your Choice*, FIRST THINGS, Feb. 1995, at 37-38.

40. *See* GLENDON, *supra* note 26, at 110-13 (examining mutual support in the context of economic relations and household maintenance).

41. *See, e.g.*, LA. CIV. CODE ANN. art. 98 (West 1993) (defining mutual duties); OHIO REV. CODE ANN. § 3103.03 (Anderson 1996) (defining support obligations); WIS. STAT. ANN. § 765.001.(2) (West 1993) (stating that a marital partners owe each other "mutual responsibility and support").

42. *See, e.g.*, Dunaway v. Dunaway, 560 N.E.2d 171, 176 (Ohio 1990) ("It is clear to us that when parties marry they assume mutual obligations of maintenance and support. It is a conscious election to share life together, and this necessarily includes financial circumstances."); Brookhart v. Brookhart, No. 93CA1569, 1993 WL 483206 at *7 (Ohio App. 1993) ("It is clear to us that when parties marry they assume mutual obligations of maintenance and support."); Landmark Med. Ctr. v. Gauthier, 635 A.2d 1145, 1152 (R.I. 1994) ("One of the principal incidents of marriage that continues to evolve has been the obligation of mutual support."); Braatz v. Labor & Indus. Rev. Comm'n, 496 N.W.2d 597, 600 (Wis. 1993) ("Wisconsin law imposes a mutual duty of general support upon married couples, but there is no comparable duty of support imposed upon adult companions.").

43. *See* Blazek v. Superior Ct., 869 P.2d 509, 513-14 (Ariz. Ct. App. 1994) (noting the evidentiary privilege protecting marital communications, grounded in spousal intimacy and mutual support).

44. *See* Carminucci v. Carminucci, No. FA940138767S, 1996 WL 88428, at *5 (Conn. Super. Ct. 1996). The court stated:

> The figures offered by the defendant to prove how much he spent during the marriage in order to obtain reimbursement for those expenditures are difficult to accept seriously. One of the obligations of marriage is mutual support. If the defendant feels that his expenditures somehow were not part of his obligations to support his wife during that time, perhaps he needs enlightening on that point.

Id.

45. *See Blasek*, 869 P.2d at 512-14 (discussing spousal privilege).

laws regarding the obligations that continue after divorce.

Mutual support recognizes the natural division of labor which evolves when people undertake shared tasks—"You cook dinner, and I'll clean up afterward." This allocation of tasks is one way that couples create a shared life. Alternatively, the common law recognized that many married couples arranged this sharing of day-to-day tasks by spheres of authority. Wives were responsible for home and hearth and often reigned unchallenged in domestic matters.[46] Husbands, with little input from their wives, created or acquired the resources necessary to make domestic life possible.[47] While modern conveniences and service providers have lessened the time required to maintain a home—we no longer must make our soap, bake our bread, or sew our family's clothes—this division of labor continues to be observed by many families, particularly while raising young children.[48] Regardless of the specific form adopted by any particular couple, mutual support and sharing of day-to-day tasks remains a fundamental characteristic of marriage.

C. Consensual and Committed

Initial consent is another characteristic of marriage that is uniformly recognized throughout Western European nations.[49] Yet it is important to distinguish *initial* consent to the marriage from the current, yet pernicious idea that a marriage continues to exist legitimately only when husband and wife give *continuing* consent. One of the myths of our day is that any obligation to another must be the result of consent. Reflection reveals both the inaccuracy and undesirability of such a state of affairs. Many important obligations arise in relationships that are not the product of explicit consent by the participants. At least two morally significant relationships arise before we are capable of even the most rudimentary consent—parent-child and citizen-state. The newborn does not consent to either of these relationships, yet the child owes certain duties and has certain rights by virtue of these relationships.

How do the obligations of marriage differ from those of parent-child or citizen-state? Unlike the status of citizen, daughter, or son, the status of wife or husband is dependent upon consent for its creation. This is true because of the fundamental nature of marriage. There can be no gift of self from the unwilling giver. Obedience, protection, sharing of

46. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 7-8 (1985) (discussing women's role in the home).

47. *See id.*; *see also* Wardle, *supra* note 17.

48. *See* Brinig & Crafton, *supra* note 33, at 875-76.

49. *See* GLENDON, *supra* note 26, at 38.

possessions—all of these can be received from an unwilling giver, but not the essence of marriage. Thus consent must exist at the outset.[50]

However, consent to marriage is not the omniscient exercise of enlightened self-interest that much of modern contract law envisions. Instead it is a statement of personal commitment—an agreement to will the good of another consistently through the gift of self.[51] This is true because the decision to marry is made with incomplete knowledge. At the time of the marriage ceremony, it is impossible to understand fully the past experiences and present desires of the other. No amount of "due diligence" will completely eliminate this fact. Even more mysterious are the future events that both husband and wife must respond to as they live out their commitment to be married. Thus what begins by consent continues, not by continuous reconsideration and renewal of the initial consent, but by acts of will, intellect, spirit and body consistent with the commitment expressed by the initial "I do."

D. Exclusive

Marriage, as a total gift of self between husband and wife, is most fully experienced in an exclusive relationship. Implicit in the idea of exclusivity is the loyalty and intimacy enjoyed within the "bonds of matrimony." Exclusivity is a necessary condition for the complete revelation of self that marriage entails. In part, exclusivity eliminates any basis for comparison. This avoids the danger of devaluing the unique gift of the

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50. *See* Pope John Paul II, *Letter to Families*, *supra* note 20, at Nos. 8, 10, 11, *see also* FYZEE, *supra* note 35, at 88. Fyzee states:

> Juristically, [marriage] is a contract and not a sacrament. *Qua* contract, it has three characteristics: (i) there can be no marriage without consent; (ii) as in a contract, provision is made for its breach, to wit, the various kinds of dissolution by act of parties or by operation of law; (iii) the terms of a marriage contract are within legal limits capable of being altered to suit individual cases.

Id.; *see also* Greenberg, *supra* note 35, at 1045 ("Rabbinic law states that a woman may not be married without her consent.").

51. *See* Pope Paul VI, *Humanae Vitae* (Of Human Life), *in* 5 THE PAPAL ENCYCLICALS 1958-1981, at 225 (Claudia Carlen Ihm ed., 1990). Pope Paul VI stated that:

> [marriage is principally] an act of the free will, whose trust is such that it is meant not only to survive the joys and sorrows of daily life, but also to grow, so that husband and wife become in a way one heart and one soul, and together attain their human fulfillment.
>
> It is a love which is *total*—that very special form of personal friendship in which husband and wife generously share everything, allowing no unreasonable exceptions and not thinking solely of their own convenience. Whoever truly loves his partner loves not only for what he receives, but loves that partner for the partner's own sake, content to be able to enrich the other with the gift of himself.

Id. (emphasis in original).

spouse, and the damage suffered from being evaluated, rather than loved.

Also, limiting marriage to monogamous relationships affirms the equality of husband and wife. Each is the exclusive object of the other's affection and attention. In some societies recognizing polygamous marriage, the danger of wives being treated unequally is addressed by statutory requirements. Judicial approval of multiple unions is required, and that is conditioned upon a finding that the economic circumstances of each wife is assured, and that "there is no serious doubt regarding equal treatment for all wives."[52] While these requirements seemingly promise equality among the wives, no attention is given the inherent inequality between husbands and wives as persons. The husband receives the undiluted devotion of several women, while each wife receives only a partial portion of the man's love and attention.[53] This inequality may come to be viewed as a comparative measure of the worth of each spouse, resulting in a devaluing of women—both in the home and in the larger society. This inequality of persons may be the basis for the Supreme Court's observation that polygamy is inconsistent with our constitutional system of government.[54]

E. Open to the Creation of New Life

The expansive nature of married love between complementary persons is most fully realized in the creation of children. By conceiving and nurturing children, the couple exhibits a willingness to be joined together

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52. HARRY D. KRAUSE, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 6-7 (3d ed. 1990).

53. *See generally Genesis* 29-35 (providing a Biblical example in the story of Jacob, Leah, and Rachel of the consequences of unequal devotion to two wives).

54. This may be the unstated premise of the Court in *Reynolds v. United States*, 98 U.S. 145, 165-66 (1878), which reasoned:

> Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

Id.

Responding to claims that recognizing same-sex unions as marriages could result in recognition of polygamous unions, Professor Maura Strassberg argues that monogamy is the marital characteristic that forms the foundation of political liberalism, rather than a couple's sexual identity. *See* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1519 (1997).

beyond their lifetimes. Willingly bearing children evidences faith in the goodness of life, regardless of the present circumstances.[55]

Many contemporary judges and commentators ground the state's recognition of marriage as a legal institution in the fact that children are most commonly created and nurtured in the context of marriage. The opinion of the United States District Court for the Central District of California in *Adams v. Howerton* is an example of this:

> [T]he main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race. Plaintiffs argue that some persons are allowed to marry and their union is given full recognition and constitutional protection even though the above-stated justification—procreation—is not possible . . . . They point to marriages being sanctioned between couples who are sterile because of age or physical infirmity, and between couples who make clear that they have chosen not to have children. Plaintiffs go on to claim that sanctioning such unions within the protection of legal marriage, while excluding their union, constitutes an illegal discrimination against them. In my view, if the classification of the group who may validly marry is over inclusive, it does not affect the validity of the classification. In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount goals.[56]

Adams is representative of the reasoning contained in the majority of

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55. *See supra* note 23 (discussing the occurrence of high birth rates during wartime).

56. Adams v. Howerton, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980) (rejecting the claim that homosexual unions should be recognized as marriages for immigration purposes), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982); *see also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

The *Singer* court stated:

> [I]t is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.

Id.

cases considering claims for recognition of same-sex unions as marriages.[57] When pressed to define the state's interest in regulating marriage, courts traditionally have noted the desirability of a close connection between marriage, procreation and family.[58]

III. STATE RECOGNITION OF MARRIAGE

This desirability forms the basis of state recognition of marriage as well as the basis for earlier attempts to limit sexual intercourse to marital relationships. These attempts included laws criminalizing fornication, adultery, and prostitution, as well as judicial recognition of the torts of seduction and alienation of affection.[59] Many states still retain such laws, but with the exception of laws concerning prostitution, they are rarely enforced.[60]

The more contemporary approach has been to privilege the marital relationship without legally restricting sexual intercourse outside of mar-

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57. *See, e.g.*, *Adams*, 486 F. Supp. at 1124-25; *see also* Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *app. dism'd*, 409 U.S. 810 (1972); De Santo v. Barnsley, 476 A.2d 952 (Pa. 1984); *Singer*, 522 P.2d at 1195.

58. Absent such an interest, it would be impossible to defend the current Missouri Legislature proposal to pay a bounty for children born within wedlock. Therefore, only the wisdom of this action is in question.

59. *See* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1820 (1985). Schneider writes:

> The old family law also enunciated what might be called an ascetic ideal. Sexual restraint in various forms was a prominent part of this ideal. Laws prohibiting fornication, cohabitation, and adultery confined sexual relations to marriage; laws declining to enforce contracts based on meretricious consideration and laws giving relief in tort for interference with the marital relationship sought to achieve the same effect indirectly. Sexual relations were confined to monogamous marriage by laws prohibiting polygamy and to exogamous marriage by laws prohibiting incest. Sexual relations were confined to conventional heterosexuality by sodomy laws. And laws regulating the sale of contraceptives and the use of abortions made the "risks" of normal sexual relations difficult to avoid.

Id.

60. *See* Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 43 (1998) ("At least up until very recently, most scholars and lawyers probably would feel safe to assert, without pausing to do any research at all, that there is virtually no direct enforcement of the fornication and adultery prohibitions in any jurisdiction in this country."); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 345-47 (1993) (explaining that generally fornication is no longer criminalized and adultery no longer punished); RICHARD A. POSNER, SEX AND REASON 260-61, 309 (1992) (discussing rarely enforced adultery and consensual sodomy laws); Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1670-72, 1672 n.89 (1991) (arguing that criminal laws against adultery are unconstitutional and, in practice, selectively enforced); Cathryn Donohoe, *Adultery: It's Not Just a Sin, It's a Crime*, WASH. TIMES, June 29, 1990, at E1 (reporting that despite virtual lack of enforcement, adultery remains a crime in 27 states and the District of Columbia).

riage.[61] This policy has achieved mixed results under even the most generous assessment. Today, almost one-third of all children are born out of wedlock,[62] and sexually transmitted diseases are growing at an unprecedented rate for modern times.[63] Most Americans still view adultery as a serious breach of the marriage vows,[64] yet the law provides no compensation or sanction for this harmful conduct.

Simultaneously, or perhaps because of the change in sexual mores, people have begun to approach marriage with very different expectations. Instead of seeing marriage as a prerequisite to creation of a family, it is now viewed by many as primarily a means to self-gratification.[65] As the trial court in *Baehr* noted:

> [P]eople marry for a variety of reasons including, but not limited to the following: (1) having or raising children; (2) stability and commitment; (3) emotional closeness; (4) intimacy and monogamy; (5) the establishment of a framework of a long-term relationship; (6) personal significance; (7) recognition by society; and (8) certain legal and economic protections, benefits and obligations.[66]

Implicit in this listing is an assumption that each of these reasons is equally valid for the individual, and equally valuable to society. The *Baehr* trial court noted that legal recognition of marriage provided many

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61. *See* Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1941-42 (1997).

> While marriage is exalted as a valuable social institution in a normative sense, heterosexual intimate acts that occur outside of marriage, such as adultery and fornication, are usually tolerated by society .... The contemporary model of societal regulation of intimate heterosexual conduct, then, permits moral unbracketing with respect to certain institutions (i.e., the recognition, as a matter of public policy, that marriage is a normative good), but does not permit moral condemnation alone to justify the use of coercive means to discourage consensual intimate acts outside of that one (admittedly) exalted form of human relationship, namely, monogamous coupling.

Id. (citation omitted).

62. *See Rules Outlined for Lucrative Race to Curtail Out-of-Wedlock Births*, CHI. TRIB., Mar. 3, 1998, § 1, at 5.

63. *See* Thomas S. Quinn, Book Review, 337 NEW ENG. J. MED. 1177, 1177 (1997) (reviewing THE HIDDEN EPIDEMIC: CONFRONTING SEXUALLY TRANSMITTED DISEASES (Thomas R. Eng & William T. Butler eds., 1997)) (noting that the United States has the highest rate of sexually transmitted diseases of any developed country).

64. *See* ANDREW M. GREELEY, FAITHFUL ATTRACTION 163 fig. 14.2 (1991) (charting the importance of fidelity survey results).

65. *Cf.* GLENDON, *supra* note 26, at 28; Schneider *supra* note 59, at 1809 (explaining that recent trends facilitating divorce represent decreasing public enforcement of life-long fidelity moral standards and diminishing governmentally required mutual spousal responsibility).

66. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *18 (Haw. Cir. Ct. 1996).

rights and benefits.[67] Interestingly, both the trial and appellate opinions are devoid of any references to the duties and responsibilities of marriage.

Yet it is the duties and responsibilities created by marriage that make the relationship valuable to society. Foremost among these duties are the care of children conceived in the union, and the mutual support of spouses. Of these two, only the first duty emerges from conduct that should be the exclusive preserve of married couples. Sexual intercourse, by virtue of its procreative potential, is properly limited to relationships that can sustain and nurture any new life created by the activity. The ability to channel intercourse into such relationships, and to enforce the duty to sustain children created through intercourse, should be a primary concern of the state in regulating marriage.

Advocates of recognizing same-sex unions as marriage anticipate this argument and offer two responses. First, these authors argue that legal recognition of marriage is no longer tied to procreation, as evidenced by cases denying the state's ability to limit access to contraception. Relying on cases like *Griswold v. Connecticut*[68] and *Eisenstadt v. Baird*,[69] they argue that the United States Supreme Court has "insisted that married couples should be free to decide for themselves whether to use contraceptives."[70] This freedom results in the possibility that some heterosexual unions may be intentionally rendered sterile. Recognition of these unions as marriages, however, is inconsistent with the claim that procreation and parenting should be the state's primary concern in recognizing and regulating marriage.

Separate from unions intentionally rendered sterile are unions involving elderly couples who are no longer able to conceive a child. These unions are recognized as marriages by the state, even though these couples lack the requisite physical abilities necessary to procreate.[71] Advocates of same-sex unions attribute this over-inclusiveness to the fact that the law reflects the preferences of "the vast majority of those who would condemn homosexual activity while accepting the availability of divorce,

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67. *Id.*

68. 381 U.S. 479 (1965).

69. 405 U.S. 438 (1972).

70. Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 276-77 (1995).

71. *See* Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 GEO. L.J. 321 (1995); John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1067-68 (1994); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 308 (1995); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims Against Same-Sex Marriage*, 1996 BYU L. REV. 1.

contraception, and premarital sex."[72]

Yet these two groups of heterosexual unions can be morally distinguished. In the first instance, the man and/or woman has intentionally withheld from the union a major aspect of his or her being—reproductive capacity—from the union. This withholding, if intended to be permanent, makes the communion of persons constituting the reality of marriage impossible. The couple is neither willing to permeate every aspect of the present with the gifts of their love, nor are they willing for their union to transcend time through the creation of children. It is this willful refusal to enter full communion that distinguishes such relationships from marriages.

In contrast, the second group, while physically unable to transcend time through procreation, is capable of permeating the present with total gifts of self. The partners create no intentional limitation on the communion. Thus, these couples still create the metaphysical reality of marriage through their actions. The biological limitation on that reality transcending time through the creation of new life is unfortunate but does not go to the heart of the marital union.

It is at this point that advocates of same-sex marriage make their second, and to my mind, more persuasive argument. They argue that some gay and lesbian couples are willing to make the same unconditional gifts of self that are the ultimate purpose and acts of marriage.[73] The fact that the sexual manifestation of their gifts is through acts other than marital intercourse does not preclude a tumultuous and ecstatic union arising from the total sharing of mind, body, and soul. Each partner still shares the most intimate aspects of his or her physical person, and each invites the other into his or her secret hopes and dreams for the future. They would argue that the reality of these shared lives constitutes marriage, and similar to the elderly heterosexual couple, the biological limitation on that reality transcending time through procreation is unfortunate but does not go to the heart of the union we should call marriage.

Inherent in this argument is a presumption that all acts of commitment and sexual intimacy are equivalent in their capacity to contribute to the communion of persons that constitutes the metaphysical reality of marriage. On this point, I disagree. The heterosexual union joins intrinsi-

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72. Macedo, *supra* note 70, at 277.

73. *See id.* at 289 (noting that recognition of homosexual marriage promotes the same values as heterosexual marriages); *see also* Ball, *supra* note 61, at 1938 (finding some empirical evidence proving similarities between the love shared by homosexual and heterosexual couples); Strassberg, *supra* note 54, at 1601 (providing explanations for marriage based on both homosexual and heterosexual beliefs).

cally different individuals. The differences between male and female transcend culture, training, and environment. While they are manifest in obvious biological differences, these differences are much broader than "he has a penis" and "she has a vagina." They affect how we experience the world. The degree to which these differences manifest themselves in our behavior is largely influenced by our culture, training, and environment, yet the differences themselves cannot be entirely eradicated regardless of culture, training, or environment.

The willing joinder of these inherent differences constitutes the mystery of marriage. Different as men and women are, there is an innate desire and unique capacity for union of the two. This desire and capacity is captured by the word "complementarity." For most men and women, their greatest fulfillment is achieved through the communion we call marriage. Their union encompasses and celebrates the diversity of their beings. While same-sex unions contain some diversity, in that they involve two unique and distinctive persons, the differences are individual rather than inherent. The similarities inherent in a same-sex union weaken the union in the same manner that similarly formed pieces joined by adhesive are less durably connected than interlocking pieces of the same material joined by the same adhesive.

This in no way suggests that same-sex unions are incapable of enduring. There is some evidence which suggests that most homosexual relationships are inherently unstable,[74] but the present divorce rate among heterosexual couples provides ample evidence that instability is not limited to the gay community.[75] Today, the "adhesive" joining any couple is comprised largely of their commitment and willpower, as well as their individual capacities to give and receive love.[76] The living example of many same-sex couples evidences the fact that some same-sex couples can and do enter into their unions with the same commitment[77] that is both a pre-

74. *See* Stanton L. Jones and Mark A. Yarhouse, *Science and the Ecclesiastical Homosexuality Debates*, 26 CHRISTIAN SCHOLAR'S REVIEW, 446, 471-72 (1997); Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage,* 39 SOUTH TEXAS L. REV. 735, 760, 764-66 (forthcoming 1998); *cf.* Yoel H. Kahn, *The Keduskah of Homosexual Relationships*, *in* ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON 71, 76 (1997) (noting the author's original belief, later refuted, as to the inherent instability of homosexual relationships).

75. *But see* GREELEY, *supra* note 64, at 35 (discussing that in 1989 two-thirds of Americans were married to their first spouse, and "a little more than four-fifths of those who are married have or have had only one spouse—the difference being those who have divorced and not remarried.").

76. *See generally* Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992) (explaining the role of the law in assisting these concepts).

77. *See* Kahn, *supra* note 74, at 76. Kahn describes his experience as follows:

condition to, and component of, authentic marriage.[78] These examples also demonstrate that the capacity to give and receive love is not restricted on the basis of sexual preference. But these aspects of same-sex unions are only relevant to their capacity to be mutually supportive, not procreative. For this reason, it is appropriate for the state to distinguish same-sex unions from the complementarity and procreative potential of opposite-sex unions.

The state does not create marriage. It recognizes the pre-existing reality. The reality of marriage necessarily requires a complementarity that is absent from same-sex unions. It is this absence that precludes moral recognition of same-sex unions as marriages.

Separate from the incapacity of same-sex unions to achieve the metaphysical reality of marriage is the more obvious limitation on their procreative potential. Because state recognition of marriage is primarily concerned with encouraging the creation and nurturing of children in stable, loving relationships, it is proper for the state to decline marital recognition of unions that by their inherent nature are non-procreative.

Historically, concern for the creation and nurturing of children has motivated the state to encourage people to marry. To accomplish this goal, marriage was given a privileged status among legal relationships. This has changed in the past thirty years. Most of the laws encouraging marriage over other forms of personal association no longer limit the personal activities of non-married people.[79] Nor does the state seriously at-

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> When I arrived to assume my pulpit in San Francisco four years ago, deep down I still believed that gay and lesbian relationships and families were, somehow, not as real, not as stable, not as committed as heterosexual marriages. I could tell many stories of what I have learned since. There are the two women who have lived together for many years without familial or communal support, who have endured long distances and job transfers, because employers thought them both single and admitting their homosexuality would have endangered their livelihoods, women who have cared for each other without benefit of insurance coverage or health benefits or any legal protection . . . .
>
> Mine is a synagogue living with AIDS. I have been humbled by the unquestioning devotion of the man who, for more than two years, went to work each morning, calling intermittently throughout the day to check in on his partner, and spent each night comforting, talking, preparing meals, and waking in the middle of the night to carry his loved one to the bathroom . . . . The loving caregiver stayed at his partner's side throughout the period of his illness and until his death.

Id.

78. *See* Collett, *supra* note 19, at 470-77 (presenting the author's five definitive characteristics of marriage); *see also supra* Part II (discussing these characteristics).

79. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) (en banc) (recognizing the prevalence and social acceptance of nonmarital relationships in modern society).

tempt to limit sexual intercourse to married couples.[80] Through a broad reading of the U.S. Constitution, courts have recognized a constitutional right to privacy within the marital relationship.[81] Intending to protect marriage as an independent sphere of authority co-existing with the state, the courts rendered the state powerless to favor marriage over the individual rights of unmarried persons. Acknowledging the importance of the decision to procreate within marriage, courts nonetheless trivialized the importance of community support for that decision. Essentially, the de facto rule of these cases is that procreation is so important to the individuals involved that the community and state must be indifferent to it. Such reasoning is unsound, and we are presently suffering the ill-effects of these decisions.

Advocates for same-sex marriage are correct when they argue that gays and lesbians are equally entitled to access any means of individual gratification that the government provides. They are incorrect, however, in their conception of marriage as a governmentally-created means to individual gratification. Marriage exists independent of the state. It is created through the consensual act of self-giving by a man and a woman. Each welcomes the total person of the other, a person who is inherently different yet complementary. This union of difference expresses itself beyond the present, by the creation of children. It is this potentiality of the marital act that warrants state recognition and encouragement of marriage. When such potential is conclusively absent as in same-sex unions, or where opposite-sex couples intentionally and permanently foreclose the procreative aspect of marriage, the state may properly recognize and encourage the mutually supportive aspects of those relationships, but it should not confuse those relationships with marriage.

IV. THE PROPRIETY OF RECOGNIZING MUTUALLY SUPPORTIVE RELATIONSHIPS

Much of the strength of the claims by same-sex couples comes from their legitimate desire to be recognized as mutually supportive.[82] They desire societal affirmation of the value of their relationships.[83] They resent the indifference signified by the absence of any legal recognition of

80. *See* Eisenstadt v. Baird, 405 U.S. 438, 443, 447, 453-55 (1972) (holding that a state may not prohibit contraceptive sales to unmarried people).

81. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (establishing a right to privacy within the marital relationship).

82. *See generally* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995).

83. *See id.*

their commitments, although most will readily agree that such indifference is superior to the condemnation inherent in laws criminalizing sodomy.[84]

Society's indifference to these unions is understandable if the relationships are reduced to only their sexual component. Because the sexual activities of same-sex couples have no procreative potential, their conduct has no capacity to affect the lives of non-participants or enrich society as a whole. At most, same-sex couples can claim that their expressions of sexual intimacy have a unitive effect within their relationship. The value of such expressions to society, however, is not readily apparent. There are many private activities that unify individuals, yet society does not endow them with any legal significance.

This response, however, trivializes the claims of same-sex marriage advocates. Their claim is broader than acknowledgment of their sexual activities. They claim that same-sex unions are valuable because they are based upon long-lasting commitments to love and care for one another.[85] When recast this way, the claim for recognition of same-sex unions has more force. The willingness of individuals to care for one another should not be lightly disregarded by the community. Depending upon the nature and scope of the commitment, society benefits from the partners' willingness to sacrifice for each other.

Faced with this claim for recognition of same-sex marriage, Hawaii created the status of "reciprocal beneficiaries."[86] Any two unmarried adults who are legally prohibited from marrying each other may file declarations of a reciprocal beneficiary status relationship with the Hawaii Director of Health.[87] After filing the declaration, the couple will be entitled to:

> [S]urvivorship rights (inheritance, workers' compensation benefits, state retirement benefits), health-related benefits (hospital visitation, private and public employee prepaid medical insurance, auto insurance coverage, mental health commitments, family and funeral leave), property (tenancy in the entirety, disaster relief loans, public land leases), legal standing (wrongful death, victim's rights, domestic violence family status) and other miscellaneous benefits (University of Hawaii facilities use, ana-

84. *See id.*

85. *See* Ball, *supra* note 61, at 1943 ("Homosexual relationships that are based on commitment, love, and fidelity, are not *im*moral or *a*moral, but are in fact *moral*, and as such should be recognized, supported, and accepted by society.") (emphasis in original).

86. 31 HAW. REV. STAT. ANN. § 572C (Michie Supp. 1997).

87. *See id.* § 572C-4 (stating the five requirements for obtaining valid reciprocal beneficiary status).

tomical gifts, government vehicle emergency use).[88]

While this legislation is the "most comprehensive rights package for nontraditional couples" in the United States,[89] it differs from legal recognition of same-sex marriage in several important respects. First, the status is not based upon a common household or intimate relationship.[90] Second, the relationship is terminated by marriage of either beneficiary, or by filing a signed notarized declaration of termination.[91] Third, it does not require private employers to pay for benefits of reciprocal beneficiaries.[92] Finally, it does not confer all marriage-related benefits.[93]

The act contains the Hawaii Legislature's findings indicating the need for such legislation:

> [T]here are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.[94]

The legislature identified a valid purpose not restricted to the gay and lesbian community. Examples of others who benefit include the many elderly individuals having no spouse or child to care for them.[95]

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88. Daniel R. Foley, *The State of Gay Marriage: Will Hawaii Lead the Way?*, 20 FAM. ADVOC. 39, 39 (1997).

89. Cheryl Wetzstein, *Few Opt for Hawaii Unmarried-Couple Benefits*, WASH. TIMES, Jan. 3, 1998, at A2 (quoting Honolulu lawyer Daniel R. Foley, counsel to the same-sex couples in *Baehr* and an expert on homosexual rights).

90. *See* David Orgon Coolidge, *Same Sex Marriage?* Baehr v. Miike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 17 (1997) (distinguishing Hawaii's reciprocal beneficiaries law from federal congressional domestic partnership statutes).

91. *See* 31 HAW. REV. STAT. ANN. § 572C-7(a).

92. *See* Wetzstein, *supra* note 89 (reporting that "[r]ecently, a judge ruled that private employers aren't required to give unmarried couples health benefits"); *see also* Coolidge, *supra* note 90, at 17.

93. *See* 1997 Haw. Sess. Laws, Act 383, § 74. The Act provides:

> Notwithstanding any other law to the contrary, the rights and benefits extended by this Act shall be narrowly interpreted and nothing in this Act shall be construed nor implied to create or extend rights or benefits not specifically provided herein.

Id.. *see also* Coolidge, *supra* note 89, at 17.

94. HAW. REV. STAT. ANN. § 572C-2 (containing the Hawaii Legislature's findings).

95. *See generally* Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683 (1991) (discussing the benefits conferred on

Such people often rely upon friends to assist them in day-to-day tasks or times of need. Legal devices such as durable powers of attorney, living wills, and joint tenancy make it possible to empower these friends with extensive authority, but only if the person is sophisticated enough to know of the devices, and affluent enough to obtain the legal assistance necessary to draft them. The creation of a reciprocal beneficiary relationship is much simpler and provides more extensive rights.

The reciprocal beneficiary status also more accurately reflects the mutually supportive nature of many relationships. Mandatory inclusion in some insurance programs recognizes the reality of our free market system of providing healthcare. While that system has played a significant role in developing the most advanced medical care in the world, an unintended consequence is that some people are without health insurance. By including reciprocal beneficiaries in government-sponsored insurance plans, Hawaii has fulfilled the legitimate desire of people to assure the physical well-being of those they care most about.

The requirement that reciprocal beneficiaries be legally prohibited from marrying one another guarantees that state-recognized marital status will not compete with reciprocal beneficiary status. To the extent that marriage continues to impose any legally cognizable duties, the creation of another legal status providing most of the benefits of marriage with none of its duties would further diminish the limited channeling effect of current marriage laws. Society's interest in promoting permanent, exclusive relationships as the proper setting for the creation and nurturing of children provides a compelling state interest to privilege marriage over any other legal status. This interest is well served by limiting reciprocal beneficiary status to individuals who cannot marry.

The absence of any requirement that reciprocal beneficiaries share a household or intimate relationship is also consistent with the state interest in promoting marriage and family over other personal relationships. In contrast to domestic partnership laws which implicitly promote unmarried unions as legitimate alternatives to marriage, the reciprocal beneficiary status created by the Hawaiian Legislature is merely conditioned on mutual consent.

Overall, the creation of reciprocal beneficiary status is a worthwhile endeavor. It affirms the commitments to provide mutual support made by people who are legally unable to marry each other. It acknowledges the true interdependence of people's lives, even in the absence of marriage or family ties. By untangling the question of sexual conduct from emotional, economic, and personal support, the Hawaii Legislature created a flexible

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the elderly through these laws).

device that rewards mutual commitment, while reserving the state imprimatur for the relationship that most benefits society—heterosexual marriage.

By the end of 1997, less than 300 couples had registered as reciprocal beneficiaries. Of those, approximately one-quarter are siblings or elderly parents and adult children. This figure is considerably less than the 20,000 couples that the Hawaii Department of Health had anticipated.[96] It is also considerably fewer than the number of people that might benefit from the legislation. But the device is new and untested and strongly associated with the gay and lesbian community. Both of these factors may make some reluctant to claim the benefits of the legislation. Hopefully as people gain experience with the status it will be recognized for what it is—legal recognition of mutually supportive relationships independent of any sexual activity between the beneficiaries.

V. CONCLUSION

The manner in which people conduct their lives is diverse and complex. Some choose to live alone, finding the burden of solitude offset by its freedom. Others choose to marry, offering a complete gift of self to another. Still others choose temporary alliances, satisfying their need for companionship, while avoiding any permanent commitment.

Of all of these choices, marriage is the most beneficial to society. When a man and a woman commit to mutual and complete self-giving, the union assumes a unique character that has the potential qualitatively to surpass all other human relationships. This union is best achieved through committed lifelong monogamy. By the act of marital intercourse, these couples express both their present unity and their willingness to be joined together in the creation of new life. When a child is conceived, marriage provides the greatest opportunity to fully nurture the child to maturity. The state has a compelling interest in supporting marriage as the best setting for the creation of and caring for children.

Same-sex unions may mirror the commitment, exclusivity, and permanence of marriage, but they can never create new human life. Complementarity, with its paradoxical unity from diversity, is required for procreativity. The biological inability of same-sex couples to give and receive the gift of each other's fertility renders same-sex unions finite and sterile. Society has no stake in the sexual union of these couples.

Such unions, however, are more than mere sexual couplings. They have another dimension that is shared with many other relationships—that of

96. *See* Susan Essoyan, *Hawaii Finds Slow Response to Domestic Partners Law*, DALLAS MORN. NEWS, Dec. 28, 1997, at 5A, *available in* 1997 WL 16187525.

mutual support. Same-sex couples, married couples, and deeply committed friends experience the benefits of mutual support. For married couples this support is a necessary incident of the union and is given legal effect through many laws. People in other relationships rarely intend to share their lives so fully, so the law has only limited provisions for commingling of property, and joint or transferred decisionmaking.

With the creation of the status of reciprocal beneficiaries, Hawaii has expanded the legal recognition of mutual support outside of marriage. By limiting this status to those who cannot marry, Hawaii has simultaneously recognized the diverse ordering of people's lives, while continuing to differentiate and affirm the goodness of marriage, a reality that can be experienced only by opposite-sex couples.